

1 UNI TED STATES DI STRI CT COURT
2 SOUTHERN DI STRI CT OF TEXAS
3 HOUSTON DI VI SI ON

4 QUANTLAB TECHNOLOGI ES LTD. * Ci vi l No. H-09-4039
5 (BVI) *
6 VERSUS * Houston, Texas
7 VI TALI Y GODLEVSKY, et al * May 12, 2010
8 * 11: 30 a.m.

9 MOTI ON HEARI NG
10 BEFORE THE HONORABLE KEI TH P. ELLI SON
11 UNI TED STATES DI STRI CT JUDGE

12 For the Plai nti ffs:

13 Mr. Al lan H. Nei ghbors, IV
14 Mr. Scott McDonal d
15 Littler Mendel son PC
16 1301 McKi nnay Street
17 Sui te 1900
18 Houston, Texas 77010

19
20 Mr. Timothy Thiel McL nturf
21 Quantl ab Fi nanci al LLC
22 4200 Montrose
23 Sui te 200
24 Houston, Texas 77006

25 For SXP Anal yti cs, LLC and Emmanuel Mamal aki s:

26 Mr. James M. Cle ary, Jr.
27 Martin, Disiere, Jefferson & Wi sdom L. L. P.
28 808 Travi s
29 Sui te 1800
30 Houston, Texas 77002

31 Proceedings recorded by mechan i cal stenography, produced by
32 computer ai ded transcri ption.

1 Appearances - Con't:

2

3 For SXP Analytics, LLC and Emmanuel Mamalakis:

4 Mr. Mark A. Camelie (Appearing by telephone)
5 Reinhart Boerner Van Deuren S.C.
6 1100 North Water Street
7 Suite 1700
8 Milwaukee, Wisconsin 53202

9

10 For Andriy Kuharsky and Anna Maravina:

11 Mr. David C. Holmes (Appearing by telephone)
12 Law Offices of David C. Holmes
13 13201 Northwest Freeway
14 Suite 800
15 Houston, Texas 77040

16

17 For Vitaliy Godlevsky:

18 Mr. Kiran Hab Romman
19 Ahmad, Zavitsanos & Anapakos, P.C.
20 3460 One Houston Center
21 1221 McKinney
22 Houston, Texas 77010

23

24 Court Reporter:

25 Fred Warner
26 Official Court Reporter
27 515 Rusk Avenue
28 Houston, Texas 77002

1 THE COURT: Good morning and welcome to all. We
2 will take appearances of counsel beginning with the
3 plaintiff, please.

4 MR. NEIGHBORS: Morning, Your Honor. Al Ian
5 Neighbors and Scott McDonald for the plaintiffs.

6 THE COURT: Welcome.

7 On the phone, can you hear us okay?

8 MR. CAMELI: Yes. Counsel I am just having a little
9 trouble hearing.

10 THE COURT: We are going to get him to put the mic
11 close to his mouth. Maybe that will help.

12 And for defendants.

13 MR. CLEARY: Judge, Jim Cleary for defendants SXP
14 and Mamakakis, and then on the phone also is Mr. Camelie.

15 MR. CAMELI: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. HOLMES: David Holmes. I represent defendants
18 Kuharsky and Maravina.

19 THE COURT: Good to see you again, Mr. Homes, at
20 least telephonically.

21 MR. HOLMES: Likewise, Your Honor.

22 MR. ROMMAN: Your Honor, Kieran Romman on behalf of
23 defendant Godlevsky.

24 THE COURT: Thank you. Anyone else?

25 I know that motion to stay is sought. We also

1 have a motion dismissed filed and a motion to impose sanctions.
2 I think we can most usefully spend our time on the motion
3 stay discovery.

4 I was not planning on hearing the motion to
5 dismiss yet. I am familiar with all the writings on that
6 issue. Would anybody like to add to what's in the writings?
7 And on the phone please identify yourselves when you speak.
8 You won't be obvious to us. And maybe identify yourselves
9 when you are speaking here in the courtroom, too, since it
10 won't be obvious.

11 MR. CAMELI: Your Honor, this is Mark Cameli on
12 behalf of SXP and Mamalakis. May I add some thoughts with
13 respect to our motion to stay?

14 THE COURT: Yes, sir.

15 MR. CAMELI: First of all, thank you for permitting
16 me to appear by phone.

17 THE COURT: Not at all. That's standard practice.
18 In any non evidentiary hearing, everybody can appear by phone
19 if they wish.

20 MR. CAMELI: Oh, thank you. I appreciate that. If
21 the wheels weren't falling off a few matters over here, I
22 would have gladly escaped this weather and been there live.

23 THE COURT: Not necessary. Not necessary.

24 MR. CAMELI: I want to start by recognizing just a
25 few important points of background regarding our motion to

1 stay. Our motion to stay discovery was filed
2 contemporaneously with our motion under Rule 11, which
3 currently -- that is a motion under Rule 11 -- currently
4 scheduled for a response from plaintiffs on May 20th and
5 reply from us 10 days later I believe on under your local
6 practices.

7 While you need not and should not decide that
8 motion today, our motion to stay touches on it just enough so
9 that there is some attention for context in today's hearing.

10 And first I want to personally, I want to tell
11 you that I personally and our firm generally do not like, do
12 not like to file Rule 11 motions. We take them quite
13 seriously, and we consider them quite carefully before we
14 proceed.

15 In this case, after the plaintiffs responded,
16 or after the plaintiffs respond more on May 20th and we are
17 given an opportunity to reply, I think you'll find that the
18 record supports our Rule 11 motion and in a compelling way.
19 But again, the merits of that are not here before you today.

20 Instead I want to touch on some background
21 leading up to it so that I can give you fuller appreciation
22 of why we seek the motion to stay.

23 My partner, Dave Hanson, who's actually lead
24 counsel on this, spoke with and gave plaintiffs' counsel a
25 detailed letter shortly after being served with the complaint

1 in an attempt to have plaintiff share some very basic facts
2 that supported this suit against SXP and Mamalakis, we
3 included that in Attachment A, and I won't review that with
4 you here.

5 The plaintiff provided nothing but a letter,
6 which is also found in the Attachment B, stating that
7 hundreds of examples Quantlab, the plaintiff's code appear on
8 SXP's computers.

9 Even if that were true, there is nothing about
10 how in any way any of it was proprietary. In fact, what we
11 know from a hearing involving Mr. Mamalakis' other counsel,
12 David Gerger, before another court down there, tens of
13 thousands of lines of so-called proprietary code shared by
14 Quantabs was really off-the-shelf Microsoft product of no
15 proprietary interest.

16 But my partner continued to reach out again to
17 plaintiffs' counsel and served a motion with the 21-day safe
18 harbor period. And again, nothing, more follow-up, and
19 formally nothing, except that we received over 400 discovery
20 requests directed to our clients.

21 A motion to stay discovery is very important in
22 the context of that pending motion. First, contrary to the
23 plaintiffs' beliefs, defendant SXP and Mamalakis are not
24 required to file a Rule 12(b)(6) motion in the condition
25 precedent to a Rule 11 motion. Indeed the very purpose of

1 the rule is to shield the party from patently baseless claims
2 and not require that they incur the cost of discovery and
3 defense. Nor as suggested by plaintiffs, are Rule 12(b)(6)
4 defenses waived in some way if a permissible motion is not
5 filed.

6 Now, we're not suggesting -- this is very
7 important -- we're not suggesting that the plaintiffs should
8 be forever barred from asserting the claim. We're simply
9 requesting that the Court require that such a claim be
10 preceded by their possession of facts in order to support the
11 claim first.

12 That brings us to the importance of staying
13 discovery here, because beyond the unnecessary expense and
14 obvious burden of complying, even with, even with the non
15 objectionable request, plaintiffs should not, should not be
16 given the luxury of fixing the deficiency in their pre-filing
17 obligation with discovery that they obtained from a party
18 harmed by those practices.

19 And this becomes even more compelling, Your
20 Honor, when weighing the balance of harms affected here.
21 For example, if you grant our motion today and stay discovery
22 and you later ultimately deny our Rule 11 motion, what
23 happens is the plaintiff would have been merely denied
24 discovery for a month, where discovery goes in this case
25 until March of 2011.

1 If, on the other hand, if you deny our motion
2 today and you order us to produce discovery and we prevail on
3 the Rule 11, then the defendants have incurred substantial
4 and unnecessary expense.

5 My final comment really concerns something
6 contained in the plaintiffs' that was sent to our office last
7 evening. The only, and I mean only evidence shared with us
8 to date and for first time last evening that would suggest a
9 link between SXP, Mamalakis and the subject conduct is set
10 forth on page 3 of that reply; and it's the last bullet
11 point, and it concerns some statements on supposedly admitted
12 to an FBI agent. There's no evidentiary foundation or other
13 basis for its admissibility, but that is the first time that
14 appeared.

15 And sure, we would like that transcript
16 unsealed; it would be great if you ordered that today, as
17 footnoted in Footnote 4. And for that matter, we'd like to
18 have the unredacted search warrant affidavits in this case
19 because the current redacted version we have has no probable
20 cause in that.

21 But more importantly, we're concerned about
22 this way of proceeding in this kind of manner to get this
23 kind of information from an opponent with information
24 possessed for the last six months when we made all of these
25 informal inquiries and formal inquiries to get it we think is

1 to the tactic that really shoul dn't be acceptabl e to the
2 Court.

3 We' d i nvi te Mr. Hol mes, who appears here on
4 l ine, Mr. Carson's attorney, to real ly weigh i n on thi s
5 statement attempt attributed to his cl ient. And I'd ask the
6 Court to that.

7 So, i n short we request that you stay di scovery
8 under these ci rcumstance to al low the Rule 11 motion to be
9 bri efed and heard, to revi ew the proffer of how pl ai ntiffs
10 met thei r Rule 11 obl i gati ons, whi ch presumabl y they wi ll
11 give thi s Court, wi thout them having the benefit of di scovery
12 from us or wi thout the defendant Mamal aki s and SXP bearing
13 the burden of unnecessary, wi th the expense of unnecessary
14 response and di scovery.

15 Thank you.

16 THE COURT: Okay. There was a lot sai d. Let me
17 gi ve pl ai ntiff a chance to respond i f you wi sh i f you want
18 to.

19 MR. NEI GH BORS: Yes, Your Honor. Shoul d I stand or
20 do you mi nd i f I --

21 THE COURT: It doesn' t matter. You can remai n
22 seated.

23 MR. NEI GH BORS: Al l an Nei ghbors for the pl ai ntiffs,
24 Your Honor.

25 I do have a few thi ngs that I bel i eve represent

1 our side of the story that I would like to present to the
2 Court.

3 THE COURT: Yes, sir.

4 MR. NEIGHBORS: But first I would like to address a
5 few things that Mr. Camelis said on the phone first.

6 THE COURT: Okay.

7 MR. NEIGHBORS: I think at least to us it's clear
8 based upon not only the motion but also the things that Mr.
9 Camelis said on the phone, it's clear to us that SXP and
10 Mamalakis are attempting to force Quantlab to do things at
11 this stage of the game which neither Rule 8 nor Rule 11
12 require us to do, and I also believe it's evident that SXP
13 and Mr. Mamalakis are confusing a bit Rule 11 with Rule 8.

14 As Your Honor is more than well aware, Rule 8
15 requires us only to give fair notice and a short and plain
16 statement of the facts of our case.

17 Now, Rule 11 really does not address that.
18 Rule 11 goes more to whether the signing attorney had done an
19 investigation sufficient to allow him to have a good faith
20 belief in those allegations. Rule 11 does not go to test the
21 allegations of the sufficiency of the allegations in the
22 complaint.

23 We believe, contrary to Mr. Camelis' statements
24 to the Court, that had SXP or Mr. Mamalakis felt that
25 Quantlab had failed to state a claim in the complaint or the

1 complaint needed a more definite statement pursuant to Rule
2 12(b), then the proper mechanism to have brought that to the
3 Court's attention was by Rule 12(b) or Rule 12(e).

4 As Your Honor is well aware, they didn't do
5 either of those things. And there is a couple of things that
6 I'd like to point out because what they are arguing is that
7 the complaint itself has not alleged facts that in their view
8 are sufficient to support going forward against them, SXP and
9 Mr. Mamalakis, and we could not disagree more wholeheartedly.

10 But there's a few things leading up to today
11 that I would like to point out to is Your Honor that I think
12 are telling of whether or not the factual allegations in the
13 complaint are sufficient against those two defendants, which
14 again I believe is different than the Rule 11 analysis.

15 But to that point, rather than file a Rule 12
16 motion in response to the complaint, SXP and Mr. Mamalakis
17 each answered the complaint on January 26th. Now, both of
18 them admitted to federal and pendent jurisdiction, they
19 admitted that venue was proper here, and they answered each
20 paragraph in the complaint.

21 And what I think is also interesting, in light
22 of what's being said here this morning, is that they each
23 asserted 27 affirmative defenses. And I am not going to go
24 through each of those, but I would like to go through a
25 couple of them because I think it's clear that when Your

1 Honor hears what some of these specific defenses are, it
2 certainly is clear to me that if SXP and Mr. Mamalakis did
3 not have fair notice of the allegations against them, there
4 is no way they could have alleged these defenses, so let me
5 give you just a couple, if I could, Your Honor.

6 And one thing I would like to point out is,
7 none of the defense have said that the complaint has failed
8 to state a claim. A couple of the defenses that they both
9 did raise were, for example, Defense No. 14, any opportunity
10 that SXP took advantage of was abandoned by plaintiffs.

11 No. 15, SXP had the legal privilege to commit
12 any act that allegedly induced the breach of duty of loyalty
13 or confidentiality.

14 Defense No. 16, any disclosure by SXP of
15 plaintiffs' alleged trade secrets was privileged.

16 22, any property alleged to be taken by SXP was
17 taken by accident or mistake.

18 24, SXP was privileged or justified to
19 interfere with any contract's claim that alleges SXP
20 interfered with.

21 And they also allege in defense 25 that
22 plaintiffs failed to allege their fraud allegations with
23 particularity.

24 It seems to us that it would have been very
25 hard for SXP or Mr. Mamalakis to have thought to allege or

1 bringing to the Court's attention any of those defenses were
2 they not able to take the complaint on the four corners and
3 understand what the allegations were against them. And that
4 is what Rule 8 goes to.

5 Rule 11 does not go to that. So, going back to
6 what I said initially, I think they're confusing a little
7 business the Rule 11 standard.

8 THE COURT: Well, I think he's saying, though, that
9 he thinks plaintiff did not have an adequate basis,
10 insufficient investigation had been done prior to filing the
11 lawsuit. And that does sound a little bit more like Rule 11
12 to me.

13 MR. NEIGHBORS: And we certainly will be fully
14 briefing.

15 THE COURT: Yeah. I understand that.

16 Let me ask this. Do you think if there is
17 going to be a battle here the battle will be joined on the
18 issue of taking versus being joined on the issue of proprietary?

19 MR. NEIGHBORS: I don't think -- yeah, both. I
20 don't think there's going to be any doubt. You know, Mr.
21 Camel mentioned that one of the points in our response was
22 that there is evidence that Mr. Mamalakis was engaged and
23 that there was code found on an SXP computer.

24 THE COURT: Right.

25 MR. NEIGHBORS: And he said, well, you know, there

1 is nothing to show at this point that it was anything other
2 than off-the-shelf.

3 Well, we disagree; but that's what discovery is
4 about. So, we believe at the end of the day --

5 THE COURT: I thought he was saying that whether
6 information was taken or not, it wasn't proprietary. I
7 thought that's what he was saying.

8 MR. NEIGHBORS: Well, that's what he says.

9 Certainly we disagree, and that's what discovery is all
10 about. So, we believe that the element of the taking is
11 going to be easily established; and we do believe it's going
12 to be clearly shown to be proprietary to Quantlab for both.

13 MR. CAMELI: Your Honor, may I add --

14 THE COURT: I am going to let Mr. Neighbors finish,
15 and then I will give you all the time you want.

16 MR. CAMELI: I'm sorry.

17 MR. NEIGHBORS: So, after they filed their answer
18 with no Rule 12, they then filed or served upon us on
19 February 12th the safe harbor letter which just alleged that
20 we had failed to conduct a adequate pre-suit investigation.

21 And in response to that, we sent them back a
22 letter that is attached I think as Exhibit B to their motion,
23 which I find it hard to believe they would take as anything
24 other than sufficient knowledge of connecting SXP and Mr.
25 Mamakakis to the case, and those things are alleged in our

1 compl ai nt.

2 So we conti nued on after that and went through
3 the whol e jo int di scovery case management pl an process. And
4 at no poi nt i n there di d anybody from that si de say anything
5 about seeki ng a stay of di scovery. In fact, what was sai d
6 was the parti es had even di scussed some settl ement
7 negotiations but agreed that some di scovery needed to be
8 taken before those cou l d reconvene. There was no menti on at
9 any poi nt i n there about any defi ci encies or any stay of
10 di scovery.

11 So, when you look at what the basi s for their
12 wi ll stay i s, Your Honor, the basi s for their stay i s the
13 si mple fact that they have fi led the Rule 11. And we
14 bel i eve, al though that's not the issue that's bei ng deci ded
15 here today, we bel i eve that the Rule 11 i s comple tely wi thout
16 meri t.

17 However, our response also ci tes a li tany of
18 cases that says that a stay of di scovery i s not warranted
19 even where the party has fi led or said they i ntend to fi le a
20 moti on to di smi ss. There's a whole li st of about fi ve
21 factors that the Court shoul d look at. And admi ttedly the
22 Court has broad di screti on i n maki ng that ul ti mate decisi on.

23 But there are several factors whi ch the Court
24 shoul d take i nto consi derati on, and they al l mi l i tate agai nst
25 the stay.

1 So, although Your Honor is the ultimately going
2 to take up the issue of the stay, of the Rule 11, which we
3 think should be done at some later time, we believe it is
4 very clear when you take into account the factors that the
5 courts have said should be add looked at in this situation,
6 that the discovery should not be stayed.

7 THE COURT: Okay.

8 MR. NEIGHBORS: And that's all fully briefed in our
9 response, and I won't go through each of the points today.

10 THE COURT: No. I am clear with all that.

11 MR. NEIGHBORS: And I know you are.

12 THE COURT: I think your colleague wants to say
13 something.

14 MR. McDONALD: May I add one point, Your Honor?

15 There is also another factor here, which is,
16 they're asserting affirmative defenses and essentially asking
17 for a stay for us to not be able to do discovery relative to
18 affirmative defenses. So they're trying to shut it down
19 after asserting affirmative defenses.

20 And the example they give of, okay, well, some
21 portions of the files that were taken were shown or
22 supposedly in this other hearing were more public or
23 off-the-shelf type of information, the problem is they're in
24 sole possession of those files.

25 They said: Well, you didn't do any

1 investigation. What could we have possibly done? I mean, we
2 don't have those files. They have those files. That's what
3 discovery is for is to look at their computers and compare
4 the files and so forth. The FBI has it and they have it, but
5 we don't. So to argue that we have not done some form of
6 investigation at this point when that investigation would be
7 impossible is contradictory in a way.

8 When you add that to the fact that they've
9 asserted some affirmative defenses, the more logical approach
10 here is to allow discovery to proceed, look at the Rule 11 on
11 its merits which, as we've already indicated, I think is
12 really very poorly reasoned.

13 And in the ultimate timing here, it won't be
14 very long in between. There's not going to be very much
15 discovery. They're going to have to answer some written
16 discovery, and that's it. But it won't delay the process any
17 if you go ahead and allow the discovery to proceed. We at
18 least begin to see what it is they're claiming affirmative
19 defense-wise they have in terms of that.

20 THE COURT: All right. Before I come back, let me
21 give other parties a chance to speak. Do other defendants
22 want to say anything?

23 MR. HOLMES: Yes. This is David Holmes.

24 THE COURT: Yes, sir.

25 MR. HOLMES: I will be brief. I will say Mr.

1 Kuharsky was quite surprised when I sent him last night a
2 copy of this response claiming that -- which says that the
3 AUSA made the statement to Mr. Kuharsky that said that
4 Mamalakis ordered him and Godlevsky to use Quantlab
5 information in SXP. He was quite surprised by that. To say
6 the least, he denied it. He said that never happened, in
7 fact.

8 But we would join with SXP's attorney in asking
9 to unseal that transcript. We would be very interested to
10 find out what that AUSA actually said because that certainly
11 is not going that Mr. Kuharsky ever said to the FBI.

12 And secondly, there is another document out
13 there that may be relevant to your Rule 11 motion that was
14 produced to us in connection with the sexual harassment suit
15 that Ms. Maravina has in state court against Quantlab, which
16 is the report that Quantlab obtained based on -- you know,
17 once again in their motion they claim that Ms. Maravina snuck
18 into her office late at night and stole one a bunch of
19 documents off their computer system.

20 What they produced to us in the state court
21 litigation is a report that shows their investigation of
22 that. I can't talk about it. It's subject to a state court
23 protective order, so I can't go into the contents; but I
24 would raise the issue for you as you resolve this motion that
25 that is a document that you may want to address in terms of

1 whether there is a Rule 11 basis. But I will tell you
2 that document is not consistent with Quantab's account of
3 what has happened. I will leave it at that.

4 THE COURT: Do any other defendants want to say
5 anything?

6 Okay. Mr. Cameli, we will come back to you
7 then.

8 MR. CAMELI: Thank you, Your Honor.

9 First of all, today, of course, is not the
10 forum in which you should answer -- or excuse me -- resolve
11 the Rule 11 motion before you.

12 We, of course, want an opportunity to respond
13 to what was put in this reply that we received last even for
14 example before you get to the merits of that; and I don't
15 think you're inclined in any event to make that ruling today,
16 particularly in light of Mr. Holmes' comments as well.

17 But the other point is that we, as experienced
18 litigators, understand that parties are entitled to
19 discovery; but we also understand that they have duties in
20 starting suits in the first place. And that line of cases
21 that deals with permitting discovery in the presence of 12(b)
22 motions is equally if even more long as it concerns courts that
23 have denied such discovery.

24 Here we are alleging even a lower standard
25 hasn't been met; that they didn't have, they didn't do due

1 diligence necessary; that they base this on speculation,
2 conjecture, guesswork. And the plain meaning and the plain
3 language of the complaint suggests that. And notwithstanding
4 our multiple efforts to get at it, they haven't produced
5 anything.

6 Now, you should also know, Your Honor, that
7 they, Quantabs, was the sole source of information given to
8 the FBI upon which they executed a search warrant. For them
9 to say that they don't have information to support these
10 allegations, but at the same time, same time are claiming
11 to -- and the government at least believes, I think probably
12 inappropriately -- that they have probable cause to believe
13 that a crime had been committed based on the information that
14 Quantabs themselves provided and no one else, for them to
15 have provided that yet come before you and say "we don't have
16 the information, it's all in the possession of the
17 defendants" just isn't a fair characterization at all.

18 So, we, as you properly pointed out, we fully
19 understand the difference between the standards at play here;
20 and it doesn't hurt Quantabs at all, even if we're wrong --
21 and I honestly don't believe we are -- but it does not hurt
22 them to wait on their discovery for another month when this
23 gets resolved because, first of all, I think it will be
24 resolved in our favor; and even if it isn't, they're out one
25 month of discovery. But when they make us go through over

1 400 discovery responses and do so and get that information
2 before they have to make their proffer to the Court in
3 support of how they met their burden, you are both causing us
4 expense and giving them, and giving them possibly the kind of
5 information that they should have had before they would have
6 started the suit.

7 Now, a way to have done this would not have
8 been to sue us in this suit, SXP and Mamaki individually,
9 but through their discovery process and their litigation
10 against other parties, if they learned information to support
11 a claim, then they should have brought the claim. And that's
12 really, that's really what should happen here, is that a
13 claim should be dismissed subject to their right to bring it
14 again at a later date.

15 And if I am right about that, if I am right
16 about that, then requiring -- and again, you are not reaching
17 the merits of today -- but requiring discovery now is just
18 grossly unfair. And again, if I'm wrong about it, all it's
19 done is delayed the discovery in a very small way given the
20 discovery schedule that's currently in place.

21 THE COURT: Well, you're assuming, I guess, that we
22 can get the motions to dismiss decided as soon as the papers
23 are submitted. That may be a little optimistic.

24 MR. CAMELI: And, I guess, Your Honor, I am thinking
25 that that would be in early to mid June. Maybe I am mistaken

1 about that. But if it isn't, of course, I leave it to the
2 Court to be the much better judge of that than I.

3 THE COURT: Of course, we see a lot of these
4 lawsuits involving a company or a partnership suing
5 individuals who have departed. I mean, this looks to me like
6 it has most of the badges of such a lawsuit. We start off
7 with four valued employees who leave, having signed
8 proprietary information agreements or, in Anna's case, a
9 confidential information and inventions agreement, creation
10 of a new company which appears to be in the same line of
11 work, some suggestion of misrepresentation to cover-up theft,
12 some suggestion of actually copying of a computer code that
13 is involved in -- that plaintiff and perhaps another entity
14 QLT are involved with.

15 Is what you think is lacking enough detail as
16 to what was taken? Is that what's missing?

17 MR. CAMELI: I think, Your Honor, it's two things.
18 Actually it's three things. And this is very important.
19 Read the complaint carefully and look at the nexus to SXP and
20 Mamakakis. They, you know, Mamakakis was not a former
21 employee. And they take a leap.

22 And so, for the first part of that, the answer
23 is, while there may be evidence that they have met a pleading
24 standard -- and by the way, they have alleged fraud here,
25 too, among other things, so they have a particularity

1 requirement.

2 But they may have, to the extent that their
3 pleading can survive this, those defendants, I don't speak to
4 that, to strictly only Mamakakis and SXP, who they are free
5 to bring into the case at such time that the discovery
6 supports that. That's our point.

7 The second is that it's the lack of information
8 supposedly that they received; and third, it's the
9 proprietary nature of that.

10 We have no information on any of that; and
11 again, I find it kind of incredible and a bit disturbing that
12 they would believe they have enough to give to a law
13 enforcement agency to support probable cause to believe a
14 crime has been committed yet appear before you here today to
15 say, well, Your Honor, they have the stuff; we need it before
16 we can actually articulate with any particularity the
17 allegations against them. I am very bothered by that just
18 conceptually.

19 And so, again, I am not talking about
20 permanently barring us from the action. I am talking
21 bringing us in when there is evidence to bring us in. I
22 haven't there is where that standard is met. And again, we
23 are not arguing -- I don't mean to argue the underlying
24 substance. What I am saying is that it's just unfair to put
25 us through discovery until that is resolved and particularly

1 based on knowing that kind of background of what our concerns
2 are.

3 THE COURT: Okay.

4 MR. NEIGHBORS: Could we briefly respond to those
5 points, Your Honor?

6 THE COURT: Yes, you may.

7 MR. NEIGHBORS: Again, hearing Mr. Camelie, I again
8 believe we are confusing Rule 8 with Rule 11. Rule 11 does
9 not require that we plead the facts. It requires that we
10 know the facts.

11 Rule 8 requires that we give a short and plain
12 statement of the facts. What he keeps coming back to is a
13 lack of information in the complaint. If they believed that
14 the complaint lacked information, what they should have done
15 was filed under Rule 12(b) or 12(e) and said, Quantlab, you
16 need to give us a more definite statement. That's not what
17 Rule 11 goes to.

18 THE COURT: Well, what I believe is being argued by
19 Mr. Camelie is that whatever might have been taken was not
20 proprietary. Is that your argument, Mr. Camelie?

21 MR. CAMELIE: That is part of the argument, Your
22 Honor, as it concerns the underlying Rule 11.

23 THE COURT: Are you doubting the taking in the first
24 is or just the proprietary nature of it.

25 MR. CAMELIE: Because it's linked to Mamakakis and

1 SXP, yes, Your Honor.

2 THE COURT: Yes, you are arguing about -- you're
3 arguing nothing was taken or you are arguing that whatever
4 was taken was not proprietary?

5 MR. CAMELI: We're arguing that as to SXP and
6 Mamakakis that nothing was taken as the entity and as
7 Mamakakis individually nor that he is linked to taking to the
8 extent it did occur. And I am not saying it did, but to the
9 extent that it did occur that he's not linked to the taking
10 by any other party.

11 And all we're saying -- and counsel is correct
12 in this regard, that there is a difference between these
13 standards; but when we reached out to say, what is your
14 knowledge, you haven't pled it here, you haven't met the
15 pleading standard, you know, particularly with the fraud
16 allegations, but you haven't met your pleading standard here
17 at all, you must have some knowledge at least of a basis for
18 bringing this, the response was not responsive; it was simply
19 to say, they have, SXP has 500 lines of code, but, you know,
20 without any kind of basis of "what do you mean, and how is it
21 proprietary in any way?"

22 So we did make that inquiry of them before we
23 brought this motion and attempted to avoid having to bring it
24 by simply saying, "well, just give us something here." And
25 they didn't.

1 And so, yes, we understand that difference
2 between those standards. And all we are respectfully saying,
3 Your Honor, is that they didn't need it. They may need it at
4 a later date, and that's fine; they can bring us back in if
5 they do, but they haven't met it yet.

6 THE COURT: Well, I keep coming back to this
7 distinction. If what was allegedly taken was not property,
8 why would they have bothered to take it? I mean, surely you
9 take only what is somehow useful, not what could be easily
10 reproduced.

11 MR. CAMELI: I don't think anyone's arguing that
12 Mamalakis took anything, Your Honor.

13 THE COURT: No, but he helped them do the alleged
14 breach and all the rest. That's the argument.

15 MR. CAMELI: That is what -- the first time that is
16 being, Your Honor, the first time that there is anything like
17 that directed that is in what we received last evening,
18 what Mr. Holmes just spoke to. That's the first time
19 anything like that has ever come some, anything. That's the
20 first time. And that's what we need to see get to the bottom
21 of, we need to get that transcript unsealed for.

22 And again, we just want an opportunity to
23 respond to their brief that they filed yesterday, which does
24 include -- and I realized it reserved, and appropriately so,
25 their right to supplement that in the Rule 11 context. And

1 so, then we will rely to it; but, you know, we want an
2 opportunity to reply to that.

3 But in the meantime, again, delaying this
4 discovery and the harm that it can cause just economic to the
5 parties who really should not be in this case in the first
6 place is in our view just not appropriate. And again, that's
7 the whole purpose of these rules is to not subject parties to
8 the expense of discovery, to the involvement in litigation
9 unless there is a basis to have them there in the first
10 place.

11 And we respectfully believe that counsel has
12 failed to find that basis. They may later. We don't believe
13 they will, they may later; but now is not the time, and
14 therefore, we should not be subject to discovery.

15 THE COURT: Okay. Mr. Neighbors.

16 MR. NEIGHBORS: Your Honor, if I may, there is a
17 couple of additional facts where points may be getting lost
18 at what's in dispute. The other individuals, Godlevsky,
19 Kuharsky they were partners in SXP. This is essentially the
20 new employees.

21 THE COURT: No. I know that.

22 MR. NEIGHBORS: And it's very common to do discovery
23 on the new employer to where people went and took the
24 proprietary information to see if the new employers got the
25 information in there and if they are complicit and at which

1 we believe the evidence indicates they would be to have them
2 as a party, as the tortiously interfering party, the party
3 that induced them to leave. They're the new employer;
4 they're the new entity.

5 The argument that our problem with needing
6 discovery in order to determine what's on the SXP's computers
7 is wrong because what was reported to the FBI was one
8 individual Maravina is taking a bunch of files. The FBI then
9 expanded the investigation out to SXP and the other
10 defendants here.

11 So, what is on their files, what got put into
12 their system and used in their business to pursue the same
13 kind of competing business is by consequence obviously
14 something that we would be needing to get discovery on them
15 to see how they used it. That's not something we would have
16 any way of having. That's why you have discovery on them as
17 a party.

18 THE COURT: Okay.

19 Anybody else want to say anything?

20 I want to take a minute to visit with my
21 colleagues. Nobody need to rise; just keep your seats.
22

23 (At this time a brief recess was taken)

24
25 THE COURT: Anything further from anybody?

1 MR. CAMELI : No, Your Honor. Thank you.

2 THE COURT: The matter is not free from doubt, but I
3 am not going to impose a stay. I do believe that the -- I am
4 willing to be convinced otherwise, but I do believe the
5 complaint rises above the standard of being sanctionable. I
6 do think it may be important to do things quickly as well as
7 thoroughly. I don't want to delay unnecessarily.

8 I will, as in every case, I will in every case
9 consider the matter of economic sanctions at any other point
10 in the timeline that I think bad faith or other frivolous
11 conduct has been invoked. I may be at some point persuaded
12 that the lawsuit was not filed in good faith; but right now I
13 think it meets the relevant standards under Rule 11, and I
14 think that there is not a sufficient basis for me staying
15 discovery pending rulings on the motion to dismiss or motion
16 for sanctions.

17 I think, in ruling that I think I am consistent
18 with the practice here throughout this district and I think
19 throughout the country.

20 Is there anything more we can achieve today?

21 MR. CAMELI : Your Honor, just a couple things. Mark
22 Camel is here.

23 So I am understanding, first of all, that
24 you're ruling on the merits of the Rule 11 as well?

25 THE COURT: I haven't finally ruled on it. I

1 haven't finally ruled on it, but it's very much my sense that
2 I think this complaint is adequate to meet Rule 11 objections

3 MR. CAMELI: Your Honor, would you then be
4 expecting, per the current stay status, that the plaintiffs
5 amend, or excuse me, supplement to the degree they wish on
6 May 20th their response to our motion and then give us an
7 opportunity to reply before making a final ruling?

8 THE COURT: Yes, I will.

9 MR. CAMELI: All right.

10 The second thing then, Your Honor, is with
11 respect to actual making the discovery, their response is due
12 on May 20th. We would like 14 days from today's date to make
13 the production, given the substantial nature of it.

14 THE COURT: Okay. Well, let's deal with that one.
15 Any objection to that?

16 MR. NEIGHBORS: Your Honor, I think that gets him
17 halfway to the stay. I think we're opposed to that, Your
18 Honor.

19 THE COURT: I am going to allow that. I am going to
20 allow that.

21 MR. CAMELI: Thank you, Your Honor.

22 And then the last matter would be just the
23 unsealing of this transcript reference by counsel on the
24 November 9 hearing before Magistrate Judge Stacy. We would
25 request that that be unsealed.

1 And we would also request that the current,
2 with respect to the search warrant executed in this matter
3 that was produced, you know, redacted form, that given the
4 nature of these proceedings, the lapse of time that has
5 occurred since then, over two years now Your Honor, that you
6 require and order that the search warrant be given to us,
7 that's all the parties, unredacted. Would you do that as
8 well?

9 THE COURT: I am going to have that under
10 advisement. I have not looked at that case. I have not
11 looked at anything to do with criminal files. I will need to
12 give that some thought.

13 MR. CAMELI: We will gladly supplement that request
14 and give you that opportunity. And I appreciate that.

15 THE COURT: Sure, sure. Happy to do that.

16 Yes, sir.

17 MR. MCLINTURF: Your Honor, I'm Tim McInturf, also on
18 the pleadings, for Quantlab.

19 THE COURT: Yes, sir.

20 MR. MCLINTURF: I just was going to tell everybody.
21 I told my friend Tim Cleary over there that we had contacted
22 the AUSA's office the other day asking what their position
23 would be if we filed a motion to unseal that hearing
24 transcript. And he said he'd have to talk to his people and
25 get back to us.

1 THE COURT: Who was the AUSA you were working with?

2 MR. McINTURF: His name is Rob Johnson.

3 THE COURT: Oh, sure. I know him.

4 MR. McINTURF: So, it's not that the parties to the
5 civil case -- you know, I think it's in the Rule 26
6 disclosures to every file, but there is some evidence that
7 they have that I think everybody would like to see; but they
8 obviously have their own feelings about that.

9 THE COURT: So the way you left it, Mr. Johnson's
10 checking with his superiors about that?

11 MR. McINTURF: Yes.

12 MR. CAMELI: So I imagine, Your Honor, we'll be
13 getting back to you on both those matters, both the November
14 of '09 proceedings as well as the warrant itself.

15 THE COURT: All right.

16 MR. CAMELI: I appreciate you taking the time again
17 and allowing me to appear.

18 THE COURT: Not at all.

19 One small matter. I saw in the papers that at
20 one point a partner at Fulbright was involved, T.J. Wray,
21 W-r-a-y, I believe, whom I do not know. But my wife has been
22 a partner at Fulbright for some 20 years. If their conduct
23 is going to be at issue in this case, I am going to have to
24 think about recusal.

25 Does anybody have a feel for how involved they

1 were in anything that happened?

2 MR. McINTURF: I think from our side, Your Honor,
3 Mr. Wray was involved for about two weeks in the beginning.
4 We went to a mediation, and he withdrew the day after it, so
5 I doubt whether his conduct was going to be involved.

6 THE COURT: Well, I will give you some time to think
7 about that. If anybody wants to raise the issue, this would
8 be the time to do it.

9 MR. CAMELI: Your Honor, I'm sorry. But can you
10 tell me again who that person was and the relation to the
11 case.

12 THE COURT: Why don't you speak to that.

13 MR. McINTURF: Your Honor, my understanding is that
14 Mr. Wray represented Mr. Godlevsky and Mr. Kuharsky as local
15 counsel in a state court matter that was pending briefly that
16 was before any of this theft issue came up.

17 MR. CAMELI: I see. Okay. Thank you. That's
18 helpful.

19 THE COURT: Thank you all very much then.

20

21 (Conclusion of proceedings)

22

23

24

25

1 CERTIFICATION
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4

5 I, Fred Warner, Official Court Reporter for the
6 United States District Court for the Southern District of
7 Texas, Houston Division, do hereby certify that the foregoing
8 pages 1 through 33 are a true and correct transcript of the
9 proceedings had in the above-styled and numbered cause before
10 the Honorable KEITH P. ELLISON, United States District Judge,
11 on the 12th day of May, 2010.

12 WITNESS MY OFFICIAL HAND at my office in Houston,
13 Harris County, Texas on this the 29th day of March, A.D.,
14 2011.

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20 _____
21 Fred Warner, CSR
22 Official Court Reporter
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